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## Shot Down: The D.C. Circuit Disarms Gun Control Laws in *Parker v. District of Columbia*

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## Notes

### SHOT DOWN!: THE D.C. CIRCUIT DISARMS GUN CONTROL LAWS IN *PARKER v. DISTRICT OF COLUMBIA*

"[T]here are more instances of the abridgement of the freedom of the people, by gradual and silent encroachment of those in power, than by violent and sudden usurpations."<sup>1</sup>

#### I. INTRODUCTION

When James Madison spoke these words, he likely would have been alarmed to know that courts would refuse to recognize an individual's right to keep and bear arms, a right understood by early Americans as one of the most essential safeguards of liberty.<sup>2</sup> During its march through the centuries, the Second Amendment has developed into an enigma law schools hardly acknowledge, legal scholars rarely discuss and gun owners frequently hide behind.<sup>3</sup> Despite the fact that the United States is the

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1. James Madison, Speech in the Virginia Ratifying Convention in Defense of the Constitution (June 6, 1788), in 3 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 87 (Jonathan Elliot ed., J.B. Lippincott Co. 2d ed. 1907) (1828).

2. See ST. GEORGE TUCKER, *BLACKSTONE'S COMMENTARIES: WITH NOTES OF REFERENCE, TO THE CONSTITUTION AND LAWS, OF THE FEDERAL GOVERNMENT OF THE UNITED STATES; AND OF THE COMMONWEALTH OF VIRGINIA* 300 (Jon Roland ed., Constitution Soc'y 2003) (1803) (asserting "whenever standing armies are kept up, and the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction"). An armed citizenry ensured that the people would not be oppressed by a tyrannical government. See, e.g., JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES*, 708-09 (Carolina Academic Press 1987) (1833) (expressing fear that deterioration of militia would undermine Second Amendment's protection). In 1833, Justice Joseph Story said:

[T]he right of the citizens to keep, and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist, and triumph over them.

*Id.* (commenting on Second Amendment's importance).

3. See, e.g., *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2002) ("A robust constitutional debate is currently taking place in this nation regarding the scope of the Second Amendment. . . . Until recently, this relatively obscure constitutional provision attracted little judicial or scholarly attention."); Brannon P. Denning, *Can the Simple Cite Be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 CUMB. L. REV. 961, 999 (1995) (arguing federal courts have participated in "constitutional gymnastics" to avoid interpreting Second Amendment to protect individual's right). See generally DAVID M. O'BRIEN, *CONSTITUTIONAL LAW AND POLITICS* 353-54 (W.W. Norton & Co. 2005) (1991) (devoting four brief paragraphs to discussion of Second and Third Amendments together);

most heavily armed country with the highest firearm-related death rates when compared to its economic counterparts around the world—or perhaps because of it—the Supreme Court has avoided defining the scope of the people’s right to keep and bear arms.<sup>4</sup>

Nelson Lund, *The Past and Future of the Individual’s Right to Arms*, 31 GA. L. REV. 1, 19 (1996) [hereinafter Lund, *Past and Future*] (“[T]here is little evidence to suggest that the Second Amendment has had any significant role in preserving the right to arms in our country.”); Christopher Chrisman, Note, *Constitutional Structure and the Second Amendment: A Defense of the Individual Right to Keep and Bear Arms*, 43 ARIZ. L. REV. 439, 441 (2001) (noting Second Amendment is largely dismissed by prominent legal scholars and many constitutional law treatises devote little space to discussion of Second Amendment).

4. See, e.g., *United States v. Lippman*, 369 F.3d 1039, 1043-44 (8th Cir. 2004) (concluding Second Amendment protects individual’s right to keep and bear arms only when possession is reasonably related to preservation of well regulated militia), *cert. denied*, 543 U.S. 1080 (2005); *Silveira*, 312 F.3d at 1056 (finding Second Amendment does not guarantee individual’s right to own or possess arms), *cert. denied*, 540 U.S. 1046 (2003); *United States v. Haney*, 264 F.3d 1161, 1165 (10th Cir. 2001) (determining federal criminal gun control law does not violate Second Amendment unless law impairs state’s ability to maintain militia), *cert. denied*, 536 U.S. 907 (2002); *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (holding Second Amendment protects individual’s right to keep and bear arms), *cert. denied*, 536 U.S. 907 (2002); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1997) (rejecting gun owner’s claim that federal statute prohibiting transfer or possession of machine guns violated gun owner’s Second Amendment right because gun owner did not show that possession of machine guns had connection with militia), *cert. denied*, 522 U.S. 807 (1997); *Hickman v. Block*, 81 F.3d 98, 100-01 (9th Cir. 1996) (holding gun owner lacked standing to sue for violation of Second Amendment because Second Amendment does not protect possession of weapon by private citizen), *cert. denied*, 519 U.S. 912 (1996); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (finding Second Amendment preserves collective right of keeping and bearing arms that bear “reasonable relationship to the preservation or efficiency of a well regulated militia” (quoting *United States v. Miller*, 307 U.S. 174, 178 (1939))), *cert. denied*, 516 U.S. 813 (1995); *Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (holding Second Amendment does not apply to states), *cert. denied*, 464 U.S. 863 (1983); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (rejecting gun owner’s claim that federal statute, which prohibited possession of unregistered machine gun, violated gun owner’s Second Amendment right because machine gun had no connection to militia, even though gun owner was member of Kansas militia), *cert. denied*, 435 U.S. 926 (1978); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (“It is clear that the Second Amendment guarantees a collective rather than an individual right.”), *cert. denied*, 426 U.S. 948 (1976); *Eckert v. City of Philadelphia*, 477 F.2d 610, 610 (3d Cir. 1973) (citing *Miller*, 307 U.S. 174 (1939)) (“[T]he right to keep and bear arms is not a right given by the United States Constitution.”), *cert. denied*, 414 U.S. 839 (1973); see also Anthony Gallia, Comment, “Your Weapons, You Will not Need Them.” *Comment on the Supreme Court’s Sixty-Year Silence on the Right to Keep and Bear Arms*, 33 AKRON L. REV. 131, 132-33 (1999) (“[T]he conflict surrounding the Second Amendment has yet to be resolved.”); *U.S. is the World’s Most Heavily Armed Society*, ME. ANTIQUE DIG., Oct. 2007, at 19A (stating United States citizens own 270,000,000 of world’s 875,000,000 firearms); Op. Off. Legal Counsel 1, 2 (Aug. 24, 2004), <http://www.usdoj.gov/olc/secondamendment2.pdf> (explaining recent interpretations of Second Amendment “have been characterized by disagreement and uncertainty”); Special Committee on Gun Violence, Am. Bar Assoc., *The U.S. Compared to Other Nations*, <http://www.abanet.org/gunviol/factsaboutgunviolence/uscompared.shtml> (last visited Jan. 19, 2008) (noting rate of death from firearms

The Second Amendment provides that “a well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.”<sup>5</sup> Although the majority of Americans believe the Constitution provides individuals with the right to possess a gun, the Court has yet to directly speak to whether the Second Amendment protects a right belonging to individuals, or only to members of a militia or a military organization.<sup>6</sup> The development of Second Amendment jurisprudence has occurred primarily at the federal appellate level, and federal courts have held almost uniformly that the Second Amendment protects a right belonging only to members of a militia.<sup>7</sup> With little guidance from the Court, however, the federal circuits disagree on the scope of the Second Amendment’s protection, and have applied different standards when addressing Second Amendment claims.<sup>8</sup>

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in United States is eight times higher than rates in its economic equivalents in world). *But see Miller*, 307 U.S. at 177, 183 (addressing Second Amendment challenge to section of National Firearms Act). *See generally* O’BRIEN, *supra* note 3, at 353 (observing Supreme Court has never “dealt extensively” with Second Amendment). The Supreme Court’s silence on the Second Amendment’s protections may reflect the Court’s perception of the Second Amendment as bad public policy. *See, e.g.,* Denning, *supra* note 3, at 1002 (concluding Supreme Court’s reluctance to approach Second Amendment cases honestly and directly illustrates Court’s view of Second Amendment as bad public policy).

5. U.S. CONST. amend. II (granting people right to keep and bear arms). Unlike most other provisions of the Bill of Rights, the Second Amendment has not been incorporated to the states through the Fourteenth Amendment. *See Parker v. District of Columbia*, 478 F.3d 370, 391 n.13 (D.C. Cir. 2007) (observing Second Amendment as “one of the few Bill of Rights provisions that has not yet been held to be incorporated through the Fourteenth Amendment”), *cert. granted in part sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.).

6. *See Silveira*, 312 F.3d at 1061 (noting Supreme Court’s jurisprudence on Second Amendment’s scope is limited); Roland Docal, Comment, *The Second, Fifth, and Ninth Amendments—The Precarious Protectors of the American Gun Collector*, 23 FLA. ST. U. L. REV. 1101, 1117 (1996) (observing anti-gun advocates perceive Supreme Court’s silence on issue as approval of gun control legislation, whereas pro-gun advocates interpret Court’s silence as recognition of individual’s right to keep and bear arms); Gordon Witkin et al., *The Fight to Bear Arms*, U.S. NEWS & WORLD REP., May 22, 1995, at 29 (discussing poll taken in 1995 where 75% of Americans answered individuals have constitutional right to own gun). *But cf. Burton v. Sills*, 394 U.S. 812, 812 (1969) (per curiam) (dismissing gun owner’s appeal based on lack of substantial federal question of New Jersey Supreme Court holding that Second Amendment permits regulation of firearms as long as regulation does not impair active, organized militias of states).

7. *See* David A. Lieber, Comment, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court’s Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1097 (2005) (noting federal courts typically uphold federal gun regulations against Second Amendment challenges).

8. *See* Denning, *supra* note 3, at 999-1000 (arguing federal courts have not accurately applied holding of *Miller* and have taken different approaches to avoid construing Second Amendment to apply to individuals). *But see* Robert J. Spitzer, *The Second Amendment “Right to Bear Arms” and United States v. Emerson*, 77 ST. JOHN’S L. REV. 1, 18 (2003) (arguing federal courts have “uniformly embraced the collective interpretation of the Second Amendment as the central conclusion of *Miller*”). For a discussion of the various standards federal courts have used when

Since 1939, federal courts have cited *United States v. Miller*,<sup>9</sup> the only Supreme Court case interpreting specifically the Second Amendment in the twentieth century, for some version of the proposition that the Second Amendment prohibits only laws that interfere with the preservation of a well regulated militia.<sup>10</sup> Unfortunately, a number of commentators have concluded *Miller* provides minimal guidance as to whose right the Second

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addressing Second Amendment claims, see *infra* notes 56-74 and accompanying text.

9. 307 U.S. 174 (1939).

10. See *Silveira*, 312 F.3d at 1066 (finding Second Amendment protects people's right to maintain state militia and does not establish individual's right to possess firearms for personal use); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999) (affirming dismissal of individual's Second Amendment claim where individual did not demonstrate nexus between statute's restriction of firearms and operation of state militias); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) (emphasizing *Miller* interpreted Second Amendment to protect possession or use of weapon that is reasonably related to militia); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (observing *Miller* required reasonable relationship between possession or use of weapon and activity related to militia); *Hickman v. Block*, 81 F.3d 98, 100-01 (9th Cir. 1996) (holding Second Amendment does not protect possession of weapon by individual); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (noting Second Amendment confers collective right of keeping arms that bear reasonable relationship to preservation or efficiency of well regulated militia); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) (determining individual's possession of arms was not related to preservation or efficiency of militia); *Quilici v. Morton Grove*, 695 F.2d 261, 270 (7th Cir. 1982) (determining right to bear arms is "inextricably connected" to preservation of militia); *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (en banc) (interpreting Second Amendment as guaranteeing member of militia's right to keep and bear arms); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (finding Second Amendment's purpose as stated in *Miller* was to preserve effectiveness of state militia); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) (explaining Second Amendment's right to keep and bear arms applies only to right of state to maintain militia and not to right of individual to bear arms); *United States v. Johnson*, 497 F.2d 548, 550 (4th Cir. 1974) (rejecting individual's claim that federal statute, which prohibited transporting firearm in interstate commerce after having been convicted of felony, violated Second Amendment because individual did not show federal statute affected maintenance of well regulated militia); *Eckert v. City of Philadelphia*, 477 F.2d 610, 610 (3d Cir. 1973) (finding right to keep and bear arms is not right given by Constitution); *Cases v. United States*, 131 F.2d 916, 922-23 (1st Cir. 1942) (rejecting individual's Second Amendment challenge where individual was not member of military organization and individual's use of weapon was not in preparation for military career); *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (rejecting individual's Second Amendment challenge where federal statute, which prohibited individual from receiving weapons from interstate commerce, did not infringe upon preservation of well regulated militia), *rev'd on other grounds*, 319 U.S. 463 (1943). But see *Parker*, 478 F.3d at 395 (determining Second Amendment protects individual's right to keep and bear arms that ensures individuals have arms when called for militia service), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.); *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) (declaring *Miller* supports interpretation of Second Amendment as protecting individual's right to keep and bear arms, even when individual is not member of militia or engaged in military service). See generally *Hickman*, 81 F.3d at 101 n.5 (citing *Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980)) (emphasizing Supreme Court has not interpreted Second Amendment

Amendment actually protects.<sup>11</sup> As a result, there has been disagreement among the federal circuits and legal analysts regarding whether the Second Amendment protects an individual's right to keep and bear arms or protects only the right of members of the militia to keep and bear arms.<sup>12</sup>

since *Miller*, except to cite *Miller* for proposition that federal restrictions on use of firearms by individuals do not violate constitutionally protected liberties).

11. See, e.g., *Printz v. United States*, 521 U.S. 898, 938 n.1 (1997) (Thomas, J., concurring) ("In *Miller* . . . the Court did not . . . attempt to define, or otherwise construe, the substantive right protected by the Second Amendment."); *Parker*, 478 F.3d at 393 (illustrating *Miller* only examined what arms Second Amendment protects, not collective or individual aspect of right), *cert. granted in part sub nom.* District of Columbia v. *Heller*, 128 S. Ct. 645 (2007) (mem.); *Silveira*, 312 F.3d at 1061 (asserting *Miller* "stands only for the proposition that possession of certain weapons is not protected"); Denning, *supra* note 3, at 974 ("[T]he Supreme Court's decision was based more on an absence of evidence in the record than any searching inquiry into the origin and development of the Second Amendment."); Lieber, *supra* note 7, at 1080 ("Since its decision in *United States v. Miller*, however, the Court has neither endorsed the appropriate interpretive approach nor expounded on the precise nature of the right conferred under the Second Amendment."). See generally *Cases*, 131 F.2d at 922 (emphasizing difficulty of establishing general rule applicable to all Second Amendment challenges); Carl T. Bogus, *What Does the Second Amendment Restrict? A Collective Rights Analysis*, 18 CONST. COMMENT. 485, 516 (2001) ("The Second Amendment sets forth a principle, not a formula. The parameters of the right can only sensibly be mapped on a case by case basis"); Lund, *Past and Future*, *supra* note 3, at 3 (proposing technological advances in weapons since eighteenth century demonstrate need for creation of legal distinctions Framers did not consider); Chrisman, *supra* note 3, at 439 ("[M]uch confusion continues to surround the nature of the Second Amendment, confusion that has only been exacerbated by the courts' reluctance to examine the issue."); Gallia, *supra* note 4, at 134 (recognizing *Miller* did not discuss substantive right of Second Amendment).

12. See, e.g., *Parker*, 478 F.3d at 379 (discussing individual right and collective right theories of Second Amendment), *cert. granted in part sub nom.* District of Columbia v. *Heller*, 128 S. Ct. 645 (2007) (mem.). While the collective right theory and the individual right theory are the two leading views, some scholars have developed alternative theories that fall somewhere between the two. See, e.g., *Emerson*, 270 F.3d at 219 (noting, under "sophisticated collective rights" view, Second Amendment guarantees right to keep and bear arms to members of organized state militia who bear arms while participating in militia only if federal and state governments do not provide arms for service). Under this theory, individuals could be completely disarmed because the only modern organized, active militia is the National Guard, and the National Guard is armed by the federal government. See *id.* (setting forth sophisticated collective rights model). See generally ELLEN ALDERMAN & CAROLINE KENNEDY, IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION 97 (William Morrow & Co. 1991) (1990) (noting scholars who usually favor narrow reading of Constitution believe Second Amendment should be interpreted broadly, whereas scholars who typically advocate broad protection for individual rights believe Second Amendment applies to federal government's right to raise militia and does not guarantee individual's right to keep and bear arms). For a discussion of the collective right theory and the individual right theory, see *infra* notes 33-43 and accompanying text. For further discussion of the sophisticated collective rights model, see Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 YALE L.J. 995, 1003-04 (1995) (book review) (explaining that, under sophisticated collective right view, Second Amendment protects individual's ownership and use of arms, but only to extent ownership of arms is related to maintaining militia).

During the 1970s and the 1980s, legal scholars generally agreed the Second Amendment did not protect an individual's right to keep and bear arms, although the Executive branch has supported different interpretations of the Second Amendment over the years.<sup>13</sup>

Recently, many academics and government officials have concluded the Second Amendment protects a right belonging to individuals, and is not limited to individuals who serve in the militia.<sup>14</sup> In *United States v.*

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13. See, e.g., David T. Hardy, *A Well-Regulated Militia: The Founding Fathers and The Origin of Gun Control in America*, 15 WM. & MARY BILL RTS. J. 1237, 1239 (2007) (book review) (observing by 1970s, collective right theory was predominant view of Second Amendment); Op. Off. Legal Counsel, *supra* note 4, at 6 (observing legislation signed by President Roosevelt in 1941 concerned registration of firearms "possessed by any individual for his personal protection or sport" and prohibited infringement of "the right of any individual to keep and bear arms"). In 1959, the Office of Legal Counsel reviewed a bill that would have involved the disposition of rockets, missiles and earth satellites and determined there would be constitutional problems under the Second Amendment if the bill prohibited private individuals from possessing ammunition for firearms. See Op. Off. Legal Counsel, *supra* note 4, at 7 (implying Second Amendment protects individual's right). Several years later, however, the Justice Department advanced the collective right theory of the Second Amendment. See *id.* (noting congressional testimony in 1965 supported collective right theory).

14. See *Nordyke v. King*, 319 F.3d 1185, 1192 (9th Cir. 2003) (Gould, J., specially concurring) (arguing Ninth Circuit was incorrect in *Hickman* to hold Second Amendment does not protect individual's right, and Ninth Circuit should have, instead, followed *Emerson* and adopted individual right view); *Hale*, 978 F.2d at 1021 (Beam, J., concurring) (rejecting idea that *Miller* held Congress has power to prohibit individual from possessing firearm); Brief for the United States in Opposition to Petition for a Writ of Certiorari at 19 n.3, *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001) (No. 01-8780) (noting current position of United States is that Second Amendment broadly protects right of individuals to possess firearms, and is not limited to members of militia or individuals engaged in military training or service); Lund, *Past and Future*, *supra* note 3, at 76 ("The Second Amendment unambiguously and irrefutably establishes an individual right to keep and bear arms"); Chrisman, *supra* note 3, at 463 (arguing Second Amendment recognizes individual's right); Harold J. Krent, *All Amendments Were Created Equal*, CHI. DAILY L. BULL., Apr. 25, 1998, at 6 (explaining many academics recently determined Second Amendment protects individual ownership of arms and reasoned, in part, that "the people" refers to individual rights elsewhere in Constitution); Adam Liptak, *Revised View of 2nd Amendment is Cited as Defense in Gun Cases*, N.Y. TIMES, July 23, 2002, at A1 (discussing Justice Department's view that Second Amendment protects individual's right to own gun); Libby Quaid, *Giuliani Tries to Explain Past to 'Extremist' NRA*, COURIER-POST, Sept. 22, 2007, at 9A (discussing Republican Rudy Giuliani's agreement with recent federal court ruling overturning ban on private ownership of handguns in District of Columbia); Op. Off. Legal Counsel, *supra* note 4, at 2 (stating Attorney General's opinion that Second Amendment guarantees right of individual to keep and bear arms); Memorandum from the Office of the Attorney General to all United States Attorneys (Nov. 9, 2001), <http://www.usdoj.gov/ag/readingroom/emerson.htm> ("In my view, the *Emerson* opinion, and the balance it strikes, generally reflect the correct understanding of the Second Amendment."). But see *United States v. Lippman*, 369 F.3d 1039, 1043-44 (8th Cir. 2004) (determining Second Amendment protects individual's right to keep and bear arms only when possession is reasonably related to preservation of well regulated militia).

*Emerson*,<sup>15</sup> the Fifth Circuit became the first federal court to hold that the Second Amendment protects an individual's right to keep and bear arms.<sup>16</sup> Some federal court decisions after *Emerson*, however, have held the Second Amendment does not protect an individual's right.<sup>17</sup> In 2007, in *Parker v. District of Columbia*,<sup>18</sup> the D.C. Circuit joined the Fifth Circuit in holding that the Second Amendment protects an *individual's* right to keep and bear arms, and became the first federal appeals court in history to strike down gun control ordinances as unconstitutional under the Second Amendment.<sup>19</sup>

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15. 270 F.3d 203 (5th Cir. 2001).

16. Compare *id.* at 260 (holding Second Amendment protects right belonging to individuals), with *Silveira*, 312 F.3d at 1066 (finding Second Amendment does not guarantee individual's right to keep and bear firearms for personal use), *United States v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000) (holding Second Amendment does not guarantee individual's right to bear arms), *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999) (finding Second Amendment "establishes no right to possess a firearm apart from the role possession of a gun might play in maintaining a state militia"), *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) (holding Second Amendment does not guarantee individual's right to bear firearm), and *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (determining Second Amendment's right applies only to state militias). State courts also disagree on whether the Second Amendment protects an individual's right or a right belonging only to members of a militia. See *Parker*, 478 F.3d at 380 n.6 (noting at least seven state appellate courts have held Second Amendment protects individual's right while ten state appellate courts have found Second Amendment protects only right of members of militia to keep and bear arms), *cert. granted in part sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.). For a discussion of state constitutional provisions that provide a right to keep and bear arms, see Lieber, *supra* note 7, at 1115-20.

17. See, e.g., *Nordyke*, 319 F.3d at 1191 (reaffirming Ninth Circuit's view that Second Amendment protects only collective right for states to maintain militia). The Ninth Circuit acknowledged, however, that the Fifth Circuit thoroughly reviewed the Second Amendment's history in *Emerson*, and opined that it would also recognize an individual's right to keep and bear arms if the Ninth Circuit had not already endorsed the collective right view in its previous cases. See *id.* ("[I]f we were writing on a blank slate, we may be inclined to follow the approach of the Fifth Circuit in *Emerson*"). Additionally, the special concurrence argued that maintaining an armed citizenry may be implicit in the concept of ordered liberty and protected by the Due Process Clause of the Fourteenth Amendment. See *id.* at 1193 n.3 (Gould, J., specially concurring) (explaining Fourteenth Amendment's Due Process Clause protects liberties "deeply rooted" in nation's history and implicit in concept of ordered liberty).

18. 478 F.3d 370 (D.C. Cir. 2007), *cert. granted in part sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.).

19. See *id.* at 395 (holding Second Amendment protects individual's right to keep and bear arms). For a discussion of the D.C. Circuit's rationale for its decision, see *infra* notes 84-116 and accompanying text. But see Brady Center to Prevent Gun Violence, *Decision by Eraser: How the Parker Court Obliterated Half of the Second Amendment* 1, 5 (2007), <http://www.gunlawsuits.org/defend/second/fantasy/pdf/parker-opinion-critique2.pdf> (arguing D.C. Circuit's opinion in *Parker* was based on inaccurate assumptions). See generally *Hickman v. Block*, 81 F.3d 98, 101 (9th Cir. 1996) (noting no individual has ever successfully demonstrated injury to interest protected by Second Amendment in federal court).



This Note discusses the development of Second Amendment jurisprudence since *Miller* and concludes that *Parker* is, in fact, consistent with *Miller*.<sup>20</sup> Additionally, this Note argues the D.C. Circuit was correct to hold the Second Amendment protects an individual's right to keep and bear arms and to strike down the District of Columbia's gun control ordinances.<sup>21</sup> Part II of this Note summarizes the conflicting views of the Second Amendment's scope.<sup>22</sup> Part III examines the federal courts' inconsistent applications of *Miller*.<sup>23</sup> Next, Part IV traces the D.C. Circuit's reasoning for its determination in *Parker*—that the District's gun control ordinances violated the Second Amendment.<sup>24</sup> Part V provides an explanation as to why the D.C. Circuit correctly held the Second Amendment protects an individual's right to keep and bear arms.<sup>25</sup> Finally, Part VI discusses the likely impact of *Parker* by placing the issue in the context of national application.<sup>26</sup>

## II. RIFLING THROUGH THE PAST: THE DEVELOPMENT OF SECOND AMENDMENT JURISPRUDENCE

### A. *Unloading the Second Amendment's Conflicting Interpretations*

The legal right of the people to keep and bear arms is a right that existed before the Constitution.<sup>27</sup> Early Americans understood the right as permitting private uses of guns, including hunting, defending against attacks by individuals and resisting a tyrannical government, in addition to any militia service the state required of an individual.<sup>28</sup> At the time the

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20. For a discussion of the development of Second Amendment jurisprudence, see *infra* notes 51-110 and accompanying text.

21. For a discussion of the *Parker* facts, see *infra* notes 75-83 and accompanying text.

22. For a discussion of the Second Amendment's history and the two prominent interpretations of the Second Amendment, see *infra* notes 27-43 and accompanying text.

23. For a discussion of cases interpreting the Second Amendment since 1939, see *infra* notes 51-110 and accompanying text.

24. For a discussion of the D.C. Circuit's analysis in *Parker*, see *infra* notes 87-116 and accompanying text.

25. For a critique of the opinions rendered in *Parker*, see *infra* notes 118-32 and accompanying text.

26. For a discussion of *Parker's* potential effect on future Second Amendment claims, see *infra* notes 133-39 and accompanying text.

27. See THOMAS M. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* 281-83 (Little, Brown & Co. 1981) (1880) (explaining Second Amendment preserved right to keep and bear arms established in English common law); see also ALDERMAN & KENNEDY, *supra* note 12, at 98 (discussing English citizens were required to possess arms because England depended upon citizen's militia, not army, to defend country). For a discussion of the right to keep and bear arms before the Constitution, see Op. Off. Legal Counsel, *supra* note 4, at 49-60.

28. See *Parker v. District of Columbia*, 478 F.3d 370, 383 (D.C. Cir. 2007) (discussing right to keep and bear arms in early America), *cert. granted in part sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.); *United States v.*

Second Amendment was drafted, the term “militia” referred generally to all adult male citizens, and rarely referred to standing military organizations.<sup>29</sup> The second Militia Act of 1792 defined the militia as all “able-bodied” male citizens between the ages of eighteen and forty-five years

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Emerson, 270 F.3d 203, 260 (5th Cir. 2001) (observing eighteenth century newspapers and letters showed early Americans believed Second Amendment guaranteed individual’s right to keep and bear arms); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 900-03 (Found. Press 2000) (1978) (recognizing Second Amendment right allows individuals to possess and use firearms in defense of themselves and their homes); Lund, *Past and Future*, *supra* note 3, at 30 (observing Second Amendment was intended to prevent federal government from using military power to tyrannize people); Nelson Lund, *The Second Amendment, Political Liberty, and the Right to Self-Preservation*, 39 ALA. L. REV. 103, 130 (1987) [hereinafter Lund, *Political Liberty*] (asserting Second Amendment protects individual’s right for self-defense); Scott Bursor, Note, *Toward a Functional Framework for Interpreting the Second Amendment*, 74 TEX. L. REV. 1125, 1131 (1996) (discussing Second Amendment protected private ownership of arms for several reasons, one being that ownership of arms for self-defense was perceived as natural right of individual); Docal, *supra* note 6, at 1106 (explaining early Americans had individual right to bear arms for self-preservation, hunting and resisting government violence). The private right of self-defense was necessary because, until the nineteenth century, most Americans did not have the protection of a professional police force. See *Parker*, 478 F.3d at 383 n.9 (noting importance of self-defense at this time in America), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.). But see Thomas M. Moncure, Jr., *The Second Amendment Ain’t About Hunting*, 34 HOW. L.J. 589, 589-92 (1991) (arguing debate over use of handguns for hunting misinterprets Second Amendment’s intended goals); Spitzer, *supra* note 8, at 6 (“The Second Amendment provides no protection for personal weapons uses, including hunting, sporting, collecting, or even personal self-protection”); Brady Center to Prevent Gun Violence, *supra* note 19, at 5 (arguing common law right of self-defense has no relationship with Second Amendment’s right to keep and bear arms). See generally O’BRIEN, *supra* note 3, at 353 (explaining Second and Third Amendments addressed concerns of revolutionary period when state militias defeated British); Gallia, *supra* note 4, at 146-47 (discussing English Bill of Rights of 1689 provision guaranteeing right to possess arms that enabled English citizens to help law enforcement, provide for common defense, resist tyrannical government and engage in self-defense). The right to keep and bear arms was a part of some state constitutions before the ratification of the Bill of Rights. See, e.g., O’BRIEN, *supra* note 3, at 353 (describing Pennsylvania’s Constitution of 1776 that provided “the people have a right to bear arms for the defense of themselves and the state”); Op. Off. Legal Counsel, *supra* note 4, at 19 (noting many early state constitutions protected individual’s right to keep and bear arms for defense of self and state).

29. See *United States v. Miller*, 307 U.S. 174, 179 (1939) (asserting militia comprised all males capable of acting together for common defense); Emerson, 270 F.3d at 226 (explaining eighteenth century militia referred to male civilians); Lund, *Past and Future*, *supra* note 3, at 22 (noting original Constitution differentiated militia from “armies,” “land forces” or “troops”). *Contra* Bogus, *supra* note 11, at 487 (arguing Founders did not believe in universal militia and after Revolutionary War some Founders believed select militia would be more useful). See generally Chuck Dougherty, Note, *The Minutemen, the National Guard and the Private Militia Movement: Will the Real Militia Please Stand Up?*, 28 J. MARSHALL L. REV. 959, 968 (1995) (noting federal government did not provide funding for state militias and states gradually allowed their militias to deteriorate).

old.<sup>30</sup> The militia was intended to resist foreign aggression, serve as an internal police force for the states and deter the use of a federal standing army against the states.<sup>31</sup> From this point, and after significant scholarly debate, two prominent interpretational theories emerged.<sup>32</sup>

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30. See *Parker*, 478 F.3d at 387 (observing Act defined militia as: “each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years” (quoting second Militia Act of 1792, ch. 33, 1 Stat. 271)), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.); *accord Miller*, 307 U.S. at 179 (describing militia as “civilians primarily, soldiers on occasion”); *Hickman v. Block*, 81 F.3d 98, 102 n.7 (9th Cir. 1996) (explaining militia system in American colonies was based upon England’s system and required all adult male citizens to possess arms for common defense). The second Militia Act of 1792 was passed on May 8, 1792, by members of the Second Congress. See *Parker*, 478 F.3d at 387 (observing Second Congress knew intended meaning of “militia” in Second Amendment because many members of Second Congress drafted Bill of Rights), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.). But see *Perpich v. Dep’t of Def.*, 496 U.S. 334, 341 (1990) (observing second Militia Act of 1792’s requirement that members of militia arm themselves was “virtually ignored” and militia never became reliable fighting force); *Hickman*, 81 F.3d at 102 n.8 (noting requirement that all men be armed was ignored in practice and led to establishment of modern National Guard system).

31. See *Perpich*, 496 U.S. at 340 (1990) (discussing compromise of individual liberty, state sovereignty and necessity of common defense resulted in constitutional provisions for national army and state militia); THE FEDERALIST NO. 46, at 327 (James Madison) (Tudor Publishing Co., 1937) (explaining standing army could not yield to “a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties”); STORY, *supra* note 2, at 708-09 (explaining militia was “natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers”); Christopher J. Schmidt, *An International Human Right to Keep and Bear Arms*, 15 WM. & MARY BILL RTS. J. 983, 996 (2007) (finding possession of arms by individuals was necessary for self-defense in colonial America because professional police force did not exist); David Yassky, *The Second Amendment: Structure, History and Constitutional Change*, 99 MICH. L. REV. 588, 597 (2000) (determining Founders’ primary concern was to ensure new nation’s military force was composed of state militias instead of federal standing army); Docal, *supra* note 6, at 1108 (discussing Framers believed armed citizenry would protect against internal abuses of power); Dougherty, *supra* note 29, at 964 (explaining after Revolutionary War, United States relied upon state militias for national defense). See generally *Miller*, 307 U.S. at 178 (asserting Second Amendment’s purpose was to guarantee militia’s continued existence and effectiveness). Though the modern militia system differs from the eighteenth century system, the militia’s purpose remains the same: to enforce the laws of the country and to oppose invasions. See U.S. CONST. art. 1, § 8, cl. 15 (asserting function of militia is to “execute the Laws of the Union, suppress Insurrections and repel Invasions”).

32. See, e.g., *Emerson*, 270 F.3d at 218 (noting courts and scholars have proposed different interpretations of Second Amendment in recent decades); *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2002) (observing increasing concerns about gun violence, passage of legislation restricting sale and use of firearms and cultural significance of firearms in America have intensified debate over Second Amendment’s scope).

## 1. The “Individual Right” Theory

Under the “individual right” theory of the Second Amendment, the Second Amendment recognizes the right of all individuals to keep and bear arms, regardless of whether an individual is a member of a militia or engaged in military service.<sup>33</sup> Individual right theorists believe the Second Amendment’s use of “militia” broadly includes all citizens.<sup>34</sup> In addition, the phrase “bear Arms” refers to any carrying of a weapon, by a soldier or a civilian.<sup>35</sup> By preserving the people’s right to keep and bear arms, the Second Amendment prohibits the federal government from disarming *individuals*, the people from which the *militia* is drawn.<sup>36</sup> Thus, an individual has standing to bring a claim for a violation of the Second Amendment.<sup>37</sup>

## 2. The “Collective Right” Theory

Conversely, under the “collective right” theory, the Second Amendment does not apply to individuals.<sup>38</sup> Rather, the Second Amendment protects the right of the state governments to maintain their militias and

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33. See Schmidt, *supra* note 31, at 985 (arguing Second Amendment’s text, while potentially ambiguous to modern reader, established individual’s right to keep and bear arms); Op. Off. Legal Counsel, *supra* note 4, at 1 (describing individual right view of Second Amendment). Advocates of the individual right view explain the First, Second and Fourth Amendments were framed together. See Lund, *Past and Future*, *supra* note 3, at 20 (asserting Second Amendment’s language is “no more ambiguous or unclear than other provisions of the Bill of Rights”).

34. See Gallia, *supra* note 4, at 139 (asserting, under individual right theory, “militia” includes all citizens regardless of whether individual is member of military).

35. See *Emerson*, 270 F.3d at 229-30 (determining Second Amendment’s use of “bear Arms” is not restricted to bearing arms in military service).

36. See Lund, *Past and Future*, *supra* note 3, at 25 (“The Second Amendment simply forbids one form of inappropriate regulation: disarming the people from whom the militia must necessarily be drawn.”).

37. See Op. Off. Legal Counsel, *supra* note 4, at 1 (describing individual right view of Second Amendment).

38. See *Parker v. District of Columbia*, 478 F.3d 370, 379 (D.C. Cir. 2007) (discussing collective right view), *cert. granted in part sub nom. District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.); *Emerson*, 270 F.3d at 218 (explaining, under collective right view, Second Amendment does not apply to individuals, but protects right of state to arm its militia); ALDERMAN & KENNEDY, *supra* note 12, at 97-98 (observing, under collective right view, common law right to keep and bear arms was not individual right to keep weapons, but existed for defense of state and community); Bogus, *supra* note 11, at 492 (arguing Second Amendment protects right of states to arm militia); Lieber, *supra* note 7, at 1084 (emphasizing Framers viewed Second Amendment as protection against federal intrusion into states’ power over governance of their militias, not as individual’s right); Warren E. Burger, *The Right to Bear Arms*, *PARADE MAG.*, Jan. 14, 1990, at 4 (“[T]he very language of the Second Amendment refutes any argument that it was intended to guarantee every citizen an unfettered right to any kind of weapon he or she desires.”).

prevents the federal government from usurping this power.<sup>39</sup> Under this view of the Second Amendment, the federal government and state governments can restrict and prohibit the possession and use of firearms subject only to constitutional constraints (e.g., due process and equal protection violations).<sup>40</sup> Furthermore, under the collective right theory, the federal government may disarm individuals when it no longer needs a militia.<sup>41</sup> In addition, collective right theorists believe the common law right to keep and bear arms existed for the defense of the state—not for an individual's private use.<sup>42</sup> Thus, according to collective right theorists, individuals lack the standing constitutionally required to bring claims under the Second Amendment.<sup>43</sup>

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39. See *Presser v. Illinois*, 116 U.S. 252, 265 (1886) (noting Second Amendment limits only power of Congress and not power of states); *United States v. Cruikshank*, 92 U.S. 542, 553 (1875) (asserting Second Amendment's right shall not be infringed by Congress); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) ("The purpose of the Second Amendment is to restrain the federal government from regulating the possession of arms where such regulation would interfere with the preservation or efficiency of the militia."); 79 AM. JUR. 2D *Weapons and Firearms* § 5 (2007) ("The Second Amendment to the Constitution of the United States, in declaring that the right of the people to keep and bear arms shall not be infringed, means no more than that this right shall not be infringed by Congress . . . ."); 94 C.J.S. *Weapons* § 5 (2007) (explaining it is well-established Second Amendment limits power of federal government); Denning, *supra* note 3, at 996 (explaining, under collective right view, Second Amendment was intended to prevent federal government from interfering with state militias); Keith A. Ehrman & Dennis A. Henigan, *The Second Amendment in the Twentieth Century: Have You Seen Your Militia Lately?*, 15 U. DAYTON L. REV. 5, 32 (1989) (asserting Framers would not have included militia clause if they intended to guarantee individual's right to keep and bear arms). *But cf.* *Nordyke v. King*, 319 F.3d 1185, 1197 (9th Cir. 2003) (Gould, J., specially concurring) ("Restricting the Second Amendment to 'collective rights' of militias and ignoring individual rights of the people betray [sic] a key protection against the recurrent tyranny that may in each generation threaten individual liberty.").

40. See *Silveira v. Lockyer*, 312 F.3d 1052, 1060 (9th Cir. 2002) (noting, under collective right theory, Second Amendment guarantees right of people to maintain effective state militia, and not individual's right to possess arms).

41. See *Nordyke*, 319 F.3d at 1197 (Gould, J., specially concurring) (exploring implications of Second Amendment if Framers intended Second Amendment to protect right of states to maintain militia).

42. See ALDERMAN & KENNEDY, *supra* note 12, at 98 (explaining collective right theorists argue restrictions on individual's ownership of guns proves validity of gun control laws); Dougherty, *supra* note 29, at 971 (explaining, under collective right view, Second Amendment's use of "militia" refers to National Guard, not individuals).

43. See, e.g., *Parker*, 478 F.3d at 379 (setting forth District's argument that individuals do not have standing to bring claims under Second Amendment because "militia," as intended by Framers, no longer exists today and militia's modern analogue, National Guard, is equipped by federal government), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) ("[T]here can be no serious claim to any express constitutional right of an individual to possess a firearm.").

### B. *The Demise of the Popular Militia*

The federal government changed the eighteenth century militia's structure to render the militia a viable military force in modern warfare.<sup>44</sup> In 1903, Congress passed the Dick Act, which divided the militia into the organized militia, known as the National Guard, and the unorganized militia.<sup>45</sup> In 1916, Congress declared that the Army of the United States included the National Guard.<sup>46</sup> Furthermore, since 1933, anyone who has enlisted in a state National Guard organization has concurrently enlisted in the National Guard of the United States.<sup>47</sup> In 1956, Congress passed the modern Militia Act, which defined the militia as all male citizens who are between the ages of seventeen and forty-five years old, and all female citizens who are members of the National Guard.<sup>48</sup> When addressing Sec-

44. See, e.g., Dougherty, *supra* note 29, at 976 (finding today's militia has little in common with militia Framers knew).

45. See Dick Act, ch. 196, 32 Stat. 775 (1903) (dividing militia into organized militia, known as National Guard of State, Territory or District of Columbia and Reserve Militia). The Act provided, in part:

That the militia shall consist of every able-bodied male citizen of the respective States, Territories, and the District of Columbia, and every able-bodied male of foreign birth who has declared his intention to become a citizen, who is more than eighteen and less than forty-five years of age

...  
*Id.* (defining militia); Dougherty, *supra* note 29, at 969 (noting Dick Act started federalization of militia). Congress has the power to provide for the organization, equipment and government of the militia pursuant to its Article I powers. See U.S. CONST. art. I, § 8, cl. 16 (giving Congress power to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia").

46. See National Defense Act, ch. 134, 39 Stat. 166 (1916) (providing Army of United States includes National Guard), *amended by* National Guard Act of 1933, ch. 87, 48 Stat. 153. The Act provided, in part:

That the Army of the United States shall consist of the Regular Army, the Volunteer Army, the Officers' Reserve Corps, the Enlisted Reserve Corps, the National Guard while in the service of the United States, and such other land forces as are now or may hereafter be authorized by law.

*Id.* (declaring Army of United States consists of National Guard).

47. See *Perpich v. Dep't of Def.*, 496 U.S. 334, 345 (1990) (citing National Guard Act of 1933, ch. 87, 48 Stat. 153, 160-61) (providing when individual enlists in state National Guard organization, individual becomes part of Enlisted Reserve Corps of Army and retains status as member of state National Guard unit until ordered to active duty in Army).

48. See 10 U.S.C. § 311(a) (2000) (defining modern militia). The statute provides:

The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.

*Id.* (defining militia of United States). Additionally, the Act declared the organized militia consists of the National Guard and the Naval Militia, and the unorganized militia consists of every member of the militia who is not a member of the National Guard or the Naval Militia. See *id.* § 311(b) (stating two classes of militia

ond Amendment claims, however, many federal court decisions have limited the militia to include only the National Guard, and not the members of state militias.<sup>49</sup>

### III. SORTING THROUGH "HISTORICAL RESIDUE":<sup>50</sup> FEDERAL COURTS STRUGGLE TO APPLY *MILLER*

Despite the First Circuit's characterization of *Miller* as "outdated" a mere three years after the case, both sides of the Second Amendment debate rely on *Miller* for support.<sup>51</sup> In *Miller*, the defendants were indicted

are organized militia and unorganized militia). The National Guard is a part of the national defense system, and can serve states' needs as well. *See, e.g.*, 53 AM. JUR. 2D *Military and Civil Defense* § 25 (2007) (explaining while National Guard is under state control within each state, activity and function of National Guard are primarily provided for by federal law). It is worth noting states may maintain an additional defense force to supplement the state's National Guard—this force is exempt from being drafted into the Armed Forces of the United States. *See* 32 U.S.C. § 109(c) (2000) ("In addition to its National Guard, if any, a State . . . may . . . organize and maintain defense forces. A defense force established under this section . . . may not be called, ordered, or drafted into the armed forces.").

49. *See, e.g.*, *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997) (holding individual's membership in Georgia's unorganized militia did not render individual's possession of machine guns and pipe bombs related to preservation of well regulated militia), *vacated in part on reh'g*, 133 F.3d 1412 (1998); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) (finding individual's membership in unorganized militia did not cause individual's possession of machine gun to be connected with militia activity such that Second Amendment applied); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) (noting "technical" membership in state militia or membership in non-governmental military organization does not satisfy Second Amendment's reasonable relationship test); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) (rejecting argument that because individual was member of Kansas militia individual's possession of machine gun preserved effectiveness of militia such that Second Amendment applied); *United States v. Warin*, 530 F.2d 103, 105 (6th Cir. 1976) (determining membership in "sedentary militia" does not satisfy reasonable relationship test). According to one commentator, although the militia has changed significantly since the eighteenth century, the modern definition of militia may not be as limited as federal court decisions have found. *See* Dougherty, *supra* note 29, at 974-77, 985 (asserting National Guard, law enforcement agencies and state unorganized militias fulfill eighteenth century militia's purposes in modern society).

50. *See Hale*, 978 F.2d at 1019 (describing militia's history and discussing *Miller's* finding that Second Amendment protects possession of weapon that bears reasonable relationship to preservation of militia).

51. *See Cases v. United States*, 131 F.2d 916, 922 (1st Cir. 1942) ("[T]he rule of the *Miller* case, if intended to be comprehensive and complete would seem to be already outdated."); *see also Parker v. District of Columbia*, 478 F.3d 370, 392 (D.C. Cir. 2007) (noting *Miller* is "decision that both sides of the current gun control debate have claimed as their own"), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.); Denning, *supra* note 3, at 963-65 (arguing federal courts have "strayed so far from" *Miller's* holding "to the point of being intellectually dishonest"). *See generally* *Silveira v. Lockyer*, 312 F.3d 1052, 1061 (9th Cir. 2002) ("Despite the increased attention by commentators and political interest groups to the question of what exactly the Second Amendment protects, with the sole exception of the Fifth Circuit's *Emerson* decision there exists no thorough judicial examination of the amendment's meaning.").

for transporting a short-barreled shotgun from one state to another in violation of the National Firearms Act.<sup>52</sup> The Supreme Court rejected the defendants' argument that the Act violated their Second Amendment rights, reasoning there was no evidence demonstrating the possession or use of a short-barreled shotgun had "some reasonable relationship to the preservation or efficiency of a well regulated militia."<sup>53</sup> In addition, the Second Amendment did not protect the possession of the weapon because short-barreled shotguns were associated with criminal activity, and thus did not contribute to the common defense.<sup>54</sup> As a result, the Second Amendment did not guarantee the right to keep and bear such a weapon.<sup>55</sup>

Since *Miller*, federal courts have applied different standards to Second Amendment claims—the standards range from focusing on an individual's state of mind to finding that individuals lack standing to bring a Second

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52. See *United States v. Miller*, 307 U.S. 174, 175 (1939) (explaining National Firearms Act prohibited interstate transportation of certain firearms without registration or stamped order). The National Firearms Act of 1934 was the first federal statute to regulate the possession and use of firearms. See Daniel E. Feld, Annotation, *Federal Constitutional Right to Bear Arms*, 37 A.L.R. FED. 696, §6 (1978) (discussing Second Amendment challenges to federal statutes that regulate firearms). The district court held that the Act violated the defendants' Second Amendment rights and quashed the indictment. See *Miller*, 307 U.S. at 177 (stating district court sustained defendants' demurrer that challenged their indictment based on their Second Amendment rights). On direct appeal by the Government, the Supreme Court reversed the district court's judgment. See *id.* at 178 (finding Second Amendment did not protect defendants' possession of short-barreled shotgun).

53. See *Miller*, 307 U.S. at 178 (determining use or possession of short-barreled shotgun did not have reasonable relationship to preservation of well regulated militia). The Supreme Court stated:

In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the *Second Amendment* guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

*Id.* (emphasis added) (rejecting defendants' Second Amendment claims).

54. See *id.* (commenting it was not within judicial notice that short-barreled shotgun was "ordinary military equipment" or could contribute to common defense); see also *United States v. Emerson*, 270 F.3d 203, 222 (5th Cir. 2001) (noting National Firearms Act restricted interstate transportation only of weapons used by criminals and gang members); Brief for State of Texas et al. as Amici Curiae Supporting Appellants at 30, *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 04-7041) (observing short-barreled shotgun would not contribute to common defense because short-barreled shotguns were commonly used by gang members).

55. See *Miller*, 307 U.S. at 178 (finding Second Amendment provides no right to keep and bear short-barreled shotgun).



Amendment claim.<sup>56</sup> In *Cases v. United States*,<sup>57</sup> the First Circuit, reviewing the Second Amendment as it was applied, found the Federal Firearms Act did not violate the Second Amendment because the individual's possession and use of a revolver was without "any thought or intention of contributing to the efficiency of the well regulated militia."<sup>58</sup> Furthermore, the First Circuit determined the individual was not a member of a military organization and the use of the revolver was not in preparation for a military career.<sup>59</sup> The First Circuit justified its additional requirement that the individual must possess the firearm with the intent of contributing to the militia by concluding that *Miller* did not create a standard governing Second Amendment claims.<sup>60</sup>

In *Hickman v. Block*,<sup>61</sup> the Ninth Circuit rejected an individual's claim that a weapons permit issuance policy violated the individual's Second Amendment right.<sup>62</sup> The Ninth Circuit reasoned that the individual lacked standing to sue for a violation of the Second Amendment because only states can show legal injury when the Second Amendment right is infringed.<sup>63</sup> According to the Attorney General, however, the Supreme Court's decision in *Miller* to address the defendants' Second Amendment

56. Compare *United States v. Warin*, 530 F.2d 103, 105-06 (6th Cir. 1976) (rejecting individual's Second Amendment challenge, even though individual was member of militia and possessed firearm that bore reasonable relationship to preservation of militia, because Second Amendment only applies to State's right to maintain militia), and *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (holding provision of Omnibus Crime Control and Safe Streets Act of 1968 did not violate individual's Second Amendment right because "there can be no serious claim to any express constitutional right of an individual to possess a firearm"), with *Hickman v. Block*, 81 F.3d 98, 102 (9th Cir. 1996) ("Even in states which profess to maintain a citizen militia, an individual may not rely on this fact to manipulate the Constitution's legal injury requirement by arguing that . . . he himself is a member of the armed citizenry from which the state draws its militia."), and *United States v. Tot*, 131 F.2d 261, 266 (3d Cir. 1942) (emphasizing there was no absolute constitutional right to possess weapons at common law and federal statute that reasonably classified who could possess weapons did not violate Second Amendment), *rev'd on other grounds*, 319 U.S. 463 (1943). See generally Denning, *supra* note 3, at 965 (asserting *Miller* is even more misunderstood and misinterpreted than Second Amendment).

57. 131 F.2d 916 (1st Cir. 1942).

58. See *id.* at 923 (rejecting individual's claim that Federal Firearms Act violated individual's Second Amendment right because individual possessed firearm without any intention of contributing to well regulated militia).

59. See *id.* (stating court's rationale).

60. See *id.* at 922-23 (noting *Miller* did not create general rule applicable to all cases).

61. 81 F.3d 98 (9th Cir. 1996).

62. See *id.* at 102-03 (finding individual did not have standing to sue for violation of Second Amendment).

63. See *id.* at 101 (concluding only states can show legal injury when Second Amendment right is infringed because Second Amendment guarantees right of states to maintain armed militia).

claim is inconsistent with the Ninth Circuit's view that only states can bring a Second Amendment claim.<sup>64</sup>

Modern courts addressing Second Amendment claims confront the challenge of reconciling *Miller's* declaration that the Second Amendment does not apply to members of the military and the fact that the modern militia is a part of the military.<sup>65</sup> In *United States v. Hale*,<sup>66</sup> the Eighth Circuit dismissed the plaintiff's Second Amendment challenge to a federal law that prohibited possession of unregistered machine guns because the plaintiff was not a member of the military or in preparation for a military career.<sup>67</sup> The Eighth Circuit's examination of the individual's participation in the military may have been unwarranted by *Miller*, which differentiated between the militia and the military.<sup>68</sup>

To further confound Second Amendment jurisprudence, the Fifth Circuit declared its holding in *Emerson*—that the Second Amendment protects the right of individuals to privately keep and bear arms—was consistent with *Miller*.<sup>69</sup> In *Emerson*, an individual was indicted for carrying a pistol in violation of a federal law that prohibited the possession of a fire-

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64. See Op. Off. Legal Counsel, *supra* note 4, at 5 (observing Supreme Court's decision in *Miller* to address individual's Second Amendment claim instead of rejecting individual's claim for lack of standing is inconsistent with collective right view).

65. See Dougherty, *supra* note 29, at 970 (noting Constitution's use of "militia" is complex because eighteenth century militia no longer exists). See generally National Defense Act, ch. 134, 39 Stat. 166 (1916) (declaring Army of United States consists of National Guard while serving country); *United States v. Miller*, 307 U.S. 174, 178-79 (1939) ("The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress."); Todd Barnett, *Gun Control Laws Violate the Second Amendment and May Lead to Higher Crime Rates*, 63 Mo. L. Rev. 155, 168 (1998) ("It is clear that the current National Guard, which does not embrace all eligible citizens, is not the 'well regulated militia' within the meaning of the Second Amendment.").

66. 978 F.2d 1016 (8th Cir. 1992).

67. See *id.* at 1020 (quoting *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942)) ("[W]here such a claimant presented no evidence either that he was a member of a military organization or that his use of the weapon was 'in preparation for a military career,' the Second Amendment did not protect the possession of the weapon.").

68. See Denning, *supra* note 3, at 992-93 (criticizing Eighth Circuit for "conditioning Second Amendment rights upon a showing of membership in or preparation for membership in a military organization"). One commentator asserted: "If 'militia,' as used in the Second Amendment, meant anything to the Framers, it was intended to be the opposite of 'army.'" See *id.* (arguing "militia" was not synonymous with "army"). But cf. Brady Center to Prevent Gun Violence, *Mangling Miller: How the Parker Opinion Distorted and Defied Supreme Court Precedent* 1, 13 (2007), <http://www.gunlawsuits.org/defend/second/fantasy/pdf/parker-opinion-critique1.pdf> (arguing *Miller* declared well regulated militia of Second Amendment was organized military force).

69. See *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001) ("We hold, consistent with *Miller*, that [the Second Amendment] protects the right of individuals, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms.").

arm by an individual who was subject to a domestic violence restraining order.<sup>70</sup> After exploring the Second Amendment's history, the Fifth Circuit determined the Second Amendment applies to all individuals, including those who are not members of a militia nor engaged in military service or training.<sup>71</sup> The court declared the rejection of the individual right view by the other circuits was based on an "erroneous assumption" that *Miller* settled the issue.<sup>72</sup> Nonetheless, in *Emerson*, the Fifth Circuit held the individual's Second Amendment right was not violated because an individual's right to keep and bear arms is subject to limited, "narrowly tailored" restrictions that are consistent with the Second Amendment's historical understanding.<sup>73</sup> Accordingly, prohibiting the possession of a pistol by an individual who was subject to a domestic violence restraining order was a reasonable restriction of the individual's Second Amendment right.<sup>74</sup>

#### IV. PARKER: A JUDICIAL HIT OR MISFIRE OF THE SECOND AMENDMENT?

##### A. *Facts and Procedure: The Residents "Fixed Their Sights" on Possessing Handguns for Self-Defense*

Ever since the Supreme Court denied the petition for certiorari in *Emerson*, individual right theorists have been waiting for another court to adopt their view; and there was *Parker*.<sup>75</sup> Six residents of the District of Columbia (the "District") challenged several of the District's gun control ordinances, claiming the ordinances violated their individual rights to

70. See *id.* at 211-12 (stating district court granted individual's motion to dismiss on grounds that federal law violated Second Amendment).

71. See *id.* at 260 (declaring Second Amendment's history confirmed text protects individual's right to keep and bear arms and provided no evidence Second Amendment limited federal government's power to maintain standing army).

72. See *id.* at 227 (asserting other circuits incorrectly interpreted *Miller* as rejecting individual right view).

73. See *id.* at 261-62 (acknowledging felons, infants and individuals of "unsound mind" have been prohibited from possessing firearms throughout history, and prosecuting individual for possession of firearm while subject to domestic violence restraining order does not violate Second Amendment).

74. See *id.* at 261 (stating individual's Second Amendment right is subject to restrictions). Reasonable restrictions of the Second Amendment by the government may be appropriate under several different theories. See, e.g., *Nordyke v. King*, 319 F.3d 1185, 1197 n.11 (9th Cir. 2003) (Gould, J., specially concurring) (commenting not all weapons are necessarily "Arms" within Second Amendment's meaning and important government interests may outweigh individual's Second Amendment right); Janice Baker, Comment, *The Next Step in Second Amendment Analysis: Incorporating the Right to Bear Arms into the Fourteenth Amendment*, 28 U. DAYTON L. REV. 35, 55 (2002) (noting strict scrutiny follows if Supreme Court adopts view that Second Amendment is fundamental to American scheme of justice); Lieber, *supra* note 7, at 1084 (proposing if Second Amendment guarantees individual's right, firearms regulations enacted by states should be subject to strict scrutiny).

75. See, e.g., *Emerson*, 270 F.3d at 260 (holding Second Amendment protects individual's right to keep and bear arms); Lieber, *supra* note 7, at 1080-81 (noting individual right view has "catapulted" recently to forefront of debate and *Emerson* was "much anticipated decision" for individual right theorists).

keep and bear arms—rights, the individuals argued, that are guaranteed by the Second Amendment.<sup>76</sup> The ordinances challenged by the residents (1) barred the registration of handguns that were not registered before 1976; (2) prohibited carrying a pistol, inside or outside the home, without a license; and (3) required that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or a similar apparatus.<sup>77</sup> The residents, none of whom were members of the District's militia, argued the drafters intended the Second Amendment to embody an individual's right protecting the private use of firearms.<sup>78</sup> On the other hand, the District argued the Second Amendment's purpose was to protect the state militias from intrusion by the federal government.<sup>79</sup> In addition, the District contended the Second Amendment's meaning of "militia" refers only to the militias organized when the Constitution was drafted, which, conveniently for the District, no longer exist.<sup>80</sup>

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76. See *Parker v. District of Columbia*, 478 F.3d 370, 373 (D.C. Cir. 2007) (explaining four residents wanted to keep handguns in their homes for self-defense and one owned registered shotgun that resident wanted to keep assembled), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.). Another resident was authorized to carry a handgun while on duty as a District of Columbia (the "District") special police officer, and wanted to keep a handgun at his home. See *id.* at 373-74 (stating District denied officer's application for registration certificate to own handgun).

77. See *id.* at 376 (describing District's gun control ordinances challenged by residents). While one of the District's ordinances barred the registration of handguns, the District did not entirely prohibit handgun registration. See D.C. CODE § 7-2502.02(a)(4) (1976) (allowing certificates for pistols registered before 1976 and excluding retired police officers of Metropolitan Police Department from ban on pistol registration). Additionally, the residents challenged one of the District's ordinances to the extent that it prevented a registered gun owner from moving a gun from one room to another within a gun owner's home. See D.C. CODE § 22-4504 (1976) (requiring resident to apply for additional license from Chief of Police who had discretion to deny application in order for resident to lawfully carry pistol, inside or outside home). The third provision the residents challenged required firearms be kept unloaded and disassembled or bound by a trigger lock. See D.C. CODE § 7-2507.02 (1976) (stating lawfully owned firearms be kept unloaded and disassembled or bound by trigger lock or similar apparatus).

78. See *Parker*, 478 F.3d at 381 (arguing "the right of the people" protects individual's right and "keep and bear arms" implies private use and ownership), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.). The residents claimed they had a right to keep firearms that were accessible and could be used for self-defense in a home. See *id.* at 374 (stating facts of case).

79. See *id.* at 378 (setting forth District's argument that people's right to bear arms refers only to military affairs and individual could invoke Second Amendment's protection only if gun control legislation impaired individual's right to serve in militia).

80. See *id.* (arguing ordinance banning all firearms would be constitutional because militia contemplated by Second Amendment no longer exists); *accord* Spitzer, *supra* note 8, at 26 ("Americans are no longer obliged to keep firearms for militia service, given that such service no longer occurs.").

The district court held the Second Amendment protects an individual's right to keep and bear arms for service in the militia only.<sup>81</sup> Therefore, the plaintiffs could not assert a claim under the Second Amendment because they were not members of the District's militia.<sup>82</sup> The residents appealed the district court's judgment and the D.C. Circuit reversed the decision, holding the "Second Amendment protects an individual[']s right to keep and bear arms."<sup>83</sup> The D.C. Circuit concluded that the District's ban on pistols that were not registered before 1976 violated the Second Amendment by unreasonably restricting the possession of handguns.<sup>84</sup> In addition, the ordinance that prevented a handgun from moving inside one's home violated the Second Amendment because it frustrated the Second Amendment's purpose of self-defense.<sup>85</sup> Finally, the District's requirement that a registered firearm be kept unloaded and disassembled or bound by a trigger lock unreasonably restricted the Second Amendment's right because the requirement also prohibited the lawful use of handguns for self-defense.<sup>86</sup>

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81. See *Parker v. District of Columbia*, 311 F. Supp. 2d 103, 109 (D.D.C. 2004) (determining there is no individual right to bear arms outside service in militia), *rev'd*, 478 F.3d 370 (D.C. Cir. 2007), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.). The district court reasoned the plaintiffs had no viable Second Amendment claims because they were not members of the District's militia. See *id.* at 109 (granting District's motion to dismiss).

82. See *id.* at 109 (stating court's holding that Second Amendment protects individual's right to keep and bear arms for service in militia only).

83. See *Parker*, 478 F.3d at 395 (stating court's holding that Second Amendment protects individual's right), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.).

84. See *id.* at 400-01 (determining pistols are "arms" within Second Amendment's meaning). But see *id.* at 407 n.13 (Henderson, J., dissenting) (arguing Second Amendment does not apply to firearm laws enacted by states because Supreme Court has never held Amendment has been incorporated). Furthermore, the dissent argued it would not make sense to incorporate the Second Amendment to the states because the Second Amendment was intended to protect the states against a potentially oppressive federal government. See *id.* (noting Amendment's only purpose was to prevent federal government from infringing Second Amendment's right).

85. See *id.* at 400 (majority opinion) (holding District's restriction on carrying pistol violated Second Amendment); *accord* *Quilici v. Morton Grove*, 695 F.2d 261, 271-72 (7th Cir. 1982) (Coffey, J., dissenting) (arguing Village's prohibition against handgun possession within home prevented individual from protecting individual's home and family, endangered law-abiding citizens and undermined maxim that home is one's castle).

86. See *Parker*, 478 F.3d at 401 (reversing district court's judgment and holding ordinances unreasonably restricted Second Amendment's right), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.). Before examining the Second Amendment's text, however, the D.C. Circuit addressed whether the residents had standing to challenge the District's gun control ordinances. See *id.* at 374-76 (recognizing residents must have suffered injury-in-fact to have constitutional standing to challenge District's ordinances). The court concluded one resident had standing because the resident had applied for a registration certificate to own a handgun and had been denied. See *id.* at 376 (finding resident's injury was denial of registration certificate).

B. *The D.C. Circuit's Groundbreaking Resolution of the Second Amendment Claim*

1. *Text of the Constitution*

In reviewing the Second Amendment claim, the D.C. Circuit first analyzed the Second Amendment's text: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."<sup>87</sup> The court rejected the District's argument that "the people" referred to the states because the Framers differentiated between "the states" and "the people" in the Tenth Amendment.<sup>88</sup> In addition, the court observed that "the people" is found in the First, Second, Fourth, Ninth and Tenth Amendments, and that the Supreme Court concluded the Second Amendment's use of "the people," consistent with these amendments, also protects an individual's right.<sup>89</sup> Thus, the D.C. Circuit determined the Second Amendment guarantees a right that belongs to an *individual*.<sup>90</sup>

The court then rejected the District's assertion that the phrase "keep and bear Arms" was purely military language, and found the phrase to

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87. See U.S. CONST. amend. II (granting people right to keep and bear arms); *Parker*, 478 F.3d at 380-81 (commenting no precedent existed in Supreme Court or D.C. Circuit), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.). While courts typically examine a constitutional provision's drafting history when interpreting the text, the D.C. Circuit noted the Second Amendment's history was minimal and unhelpful. See *Parker*, 478 F.3d at 390-91 (noting debates in First Congress imply Second Amendment's individual guarantee was settled because debates did not refer to Second Amendment's second clause), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.).

88. See U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *Parker*, 478 F.3d at 382 (rejecting District's argument that "the people" referred to states, organized militia or people engaged in militia service), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.); *accord* Op. Off. Legal Counsel, *supra* note 4, at 12 (noting Second Amendment protects individual's right because Constitution does not confer rights on state or federal governmental entities, only on individuals).

89. See *Parker*, 478 F.3d at 381-82 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)) (discussing Bill of Rights provisions that use phrase "the people," including Second Amendment, and protect individual's right), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.). The Supreme Court interpreted "the people" in the First, Second, Fourth, Ninth and Tenth Amendments as referring to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community". See *Verdugo-Urquidez*, 494 U.S. at 265 (defining "the people").

90. See *Parker*, 478 F.3d at 382 (explaining natural reading of Second Amendment's language was consistent with usage of "the people" in Bill of Rights), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.); *accord* *United States v. Emerson*, 270 F.3d 203, 227-28 (5th Cir. 2001) (finding "the people" has same meaning in Second Amendment as elsewhere in Constitution).

mean carrying arms for private purposes, including self-defense.<sup>91</sup> The District referenced the “conscientious objector clause” included in the Second Amendment’s initial draft to demonstrate that “keep and bear Arms” was purely military language.<sup>92</sup> While the phrase “bear arms” sometimes referred to the use of weapons in connection with military service in the late eighteenth century, the D.C. Circuit determined that other uses of the phrase implying a private use illustrated the Framers did not equate “bear Arms” exclusively with military service.<sup>93</sup> Additionally, the court found “keep” to mean “ownership or possession of a functioning weapon by an individual for private use.”<sup>94</sup> The District proposed, alternatively,

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91. See *Parker*, 478 F.3d at 384-85 (explaining any doubt whether “bear Arms” has military meaning is resolved by phrases “the people” and “keep,” which have individual and private meanings), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.).

92. See *id.* at 384 (explaining conscientious objector clause excused individuals who were “religiously scrupulous of bearing arms” from military service, and was intended to benefit “Quakers, Mennonites and other pacifist sects” who were ethically opposed to soldiering). According to the District, the clause equated “bearing arms” with military service, and “bearing arms” would not have been used if the phrase meant “carrying arms.” See *id.* (asserting Quakers were not religiously scrupulous of carrying arms in general, but were opposed to carrying arms for military purposes).

93. See *id.* (concluding reading phrase exclusively as military language was mistake, based upon survey of late eighteenth and early nineteenth century state constitutional provisions that illustrated phrase was used in context of self-defense). The D.C. Circuit found the word “bear” in the Second Amendment was a synonym for “carry.” See *id.* (relying upon Oxford English Dictionary, original Webster’s dictionary and Dr. Johnson’s Dictionary, often used by Supreme Court to decipher founding-era meaning of terms); *accord Emerson*, 270 F.3d at 231 (finding “bear arms” refers generally to carrying or wearing arms); Op. Off. Legal Counsel, *supra* note 4, at 10-11 (explaining “keep arms” referred to private ownership of arms “by individuals as individuals,” not keeping of arms by government or its soldiers). But see *Silveira v. Lockyer*, 312 F.3d 1052, 1074 (9th Cir. 2002) (asserting exemption from bearing arms for religiously scrupulous was exemption from carrying arms in service of state militia, not from private possession of arms); Brady Center to Prevent Gun Violence, *supra* note 19, at 7 (criticizing D.C. Circuit’s conclusion that “bear Arms” has non-military meaning). See generally Cottrol & Diamond, *supra* note 12, at 1004 (“There is considerable evidence that the armed population and the militia were intended to serve more than a simply military function.”). Additionally, the dissenting delegates at the Pennsylvania ratification convention used the phrase “bear arms” to encompass uses of weapons outside a military setting. See THE ADDRESS AND REASONS OF DISSENT OF THE MINORITY OF THE CONVENTION OF PENNSYLVANIA TO THEIR CONSTITUENTS, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 145, 151 (Herbert J. Storing ed., 1981) (“[T]hat the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game.”). But see Lieber, *supra* note 7, at 1111 (noting minority’s interpretation of Second Amendment was different than version actually approved by Congress, implying Framers intended to provide limited protection for militia only).

94. See *Parker*, 478 F.3d at 385-86 (defining “keep” as “to retain” or “to have in custody,” and rejecting District’s argument that “keep” was synonymous with “keep up,” phrase used in expressions such as “keep up a well regulated and disciplined militia”), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.); *accord COOLEY*, *supra* note 27, at 280-82 (asserting Second Amend-

that even if the Second Amendment guarantees an individual's right, the District is not prohibited from regulating the ownership of handguns, as modern handguns are not within the Second Amendment's meaning of "Arms."<sup>95</sup> Rejecting this argument, the D.C. Circuit reasoned that the second Militia Act of 1792 stated expressly what arms the members of the militia were required to keep, including pistols.<sup>96</sup> These arms must have been those weapons in common use at the time, and were precisely within the Second Amendment's protection.<sup>97</sup>

The residents further contended the Second Amendment's reference to the well regulated militia was synonymous with "the people" in the Amendment's second clause.<sup>98</sup> In contrast, the District asserted the militia referred to a civilian fighting force, regulated and organized by state law.<sup>99</sup> The court observed that the second Militia Act of 1792 required all "able-bodied" male citizens between the ages of eighteen and forty-five years old to enroll in the militia through a local militia captain or officer.<sup>100</sup> Thus, the D.C. Circuit concluded the militia did not depend upon organization by Congress because the militia existed before the militia was organized.<sup>101</sup>

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ment allowed individuals to lawfully use arms outside of militia service so individuals could efficiently use arms when needed for service). *Contra Silveira*, 312 F.3d at 1072 (finding "bear arms" referred to carrying of arms in military service only, and did not include private use of arms for personal purposes).

95. See *Parker*, 478 F.3d. at 397 (rejecting District's argument that Second Amendment does not prohibit District's regulation of handguns), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.).

96. See *id.* at 397-98 (citing second Militia Act of 1792, ch. 33, 1 Stat. 271, 271-72) (requiring dragoon and officers to be armed with swords, hangers, bayonets and pistols).

97. See *id.* at 398 (finding second Militia Act listed weapons that bore reasonable relationship to preservation of "well regulated militia"). Furthermore, like the First and Fourth Amendments, which protect modern communication devices, the Second Amendment's protection is not limited to colonial-era firearms. See *id.* (determining handgun is "descendant" of colonial-era weapon, and bears reasonable relationship to preservation of militia, even though modern handgun is more advanced than its eighteenth century counterpart).

98. See *id.* at 386 (noting residents and District agreed second clause states Second Amendment's purpose of ensuring continuance of militia).

99. See *id.* (arguing militia did not exist in absence of state organization).

100. See Second Militia Act of 1792, ch. 33, 1 Stat. 271, 271 (stating these citizens "shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company, within whose bounds such citizen shall reside").

101. See *Parker*, 478 F.3d at 387-88 (rejecting District's claim that existence of militia required organization), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.). Additionally, the D.C. Circuit rejected the District's argument that "well regulated" implied the militia consisted of a select group of soldiers. See *id.* at 389 (emphasizing that, unlike participation in modern National Guard, participation in eighteenth century militia was required and prevalent). In fact, the militia retained its popular quality even after it became "well regulated." See *id.* (stating popular militia was consistent with individual's right to keep and bear arms because preserving individual's right guaranteed militia would



## 2. Intent of the Framers

The D.C. Circuit also found the Second Amendment's placement within the Bill of Rights, which was primarily a declaration of rights belonging to individuals, supports the notion that the right to keep and bear arms is an individual's right.<sup>102</sup> Similarly, the Second Amendment's structure supports the individual right theory because the Federalists, who made up the majority of the First Congress, wrote the Second Amendment's preamble to alleviate the Anti-Federalists' concerns that the existence of the militia was in jeopardy and a strong federal government would result in oppression.<sup>103</sup> Moreover, the Second Amendment is typical of eighteenth century state constitutional provisions that stated a principle of government in a preface that was narrower than the language used to achieve the principle.<sup>104</sup> In addition, the Second Amendment's language explicitly protects the right of "the people," not the right of the "militia," to keep and bear arms.<sup>105</sup>

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be ready to serve when necessary). *But see* *Silveira v. Lockyer*, 312 F.3d 1052, 1069 (9th Cir. 2002) (defining "militia" in Second Amendment as "state-created and -organized military force").

102. *See Parker*, 478 F.3d at 383 (rejecting District's contention that First Congress placed states' right among personal liberties), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.); *accord* Op. Off. Legal Counsel, *supra* note 4, at 11 (determining Second Amendment's placement in Bill of Rights demonstrates right of people to keep and bear arms is individual's right); *cf.* Op. Off. Legal Counsel, *supra* note 4, at 36 (explaining Second Amendment could reasonably be interpreted as guaranteeing possession and use of arms for protection of "houses" guarded by Third and Fourth Amendments).

103. *See Parker*, 478 F.3d at 389-90 (determining placement of Second Amendment's civic purpose in preamble is in accord with ratification controversy, and illustrates Framers' belief that individual had right to keep and bear arms), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.). The Anti-Federalists wanted some guarantee that the popular militia would continue to exist so standing armies would not be necessary. *See id.* at 390 (explaining many people at this time considered standing armies to be "the bane of liberty"). Despite the fears of the Anti-Federalists, however, neither the Federalists nor the Anti-Federalists believed the federal government had the authority to disarm the people. *See United States v. Emerson*, 270 F.3d 203, 259 (5th Cir. 2001) (declaring Federalists recognized individual's right to keep and bear arms, and frequently reminded Anti-Federalists individuals did not face danger of federal standing army or federal control over militia because individuals were armed).

104. *See Parker*, 478 F.3d at 389-90 (finding Second Amendment's prefatory language was narrower than individual's right to keep and bear arms), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.).

105. *See id.* at 390 (reasoning Framers would have used different language if Second Amendment's right was limited to protecting militias because this language protected greater ownership and use of weapons than what was needed to sustain militia); *accord* Lund, *Past and Future*, *supra* note 3, at 26-27 (arguing that interpreting "the people" to refer to militia is illogical because Framers would have used same word if they intended to refer to same unit); Op. Off. Legal Counsel, *supra* note 4, at 11-12 (observing "the people" is used in First Amendment and Fourth Amendment and protects individual rights).

### 3. Applying *Miller*

In the final phase of its analysis, the D.C. Circuit determined that *Miller* supports the individual right theory.<sup>106</sup> In finding the Second Amendment did not protect the ownership of a short-barreled shotgun, the Supreme Court focused solely upon those arms within the scope of the Second Amendment's protection.<sup>107</sup> More importantly, the Court never stated an individual's membership in a militia or military organization was a necessary predicate for Second Amendment protection.<sup>108</sup> In fact, the Court did not discuss whether the individuals in *Miller* were members of such organizations.<sup>109</sup> Thus, according to the D.C. Circuit, the Second Amendment's protection was not limited to militia service and an individual's enjoyment of the right to keep and bear arms did not depend upon enrollment in the militia.<sup>110</sup>

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106. See *Parker*, 478 F.3d at 391-95 (analyzing Supreme Court's examinations of Second Amendment where Court discussed Second Amendment along with individual rights within Bill of Rights), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.); see also *Emerson*, 270 F.3d at 221 (rejecting Government's argument that *Miller* endorsed collective right view and dismissed individual right view).

107. See *Parker*, 478 F.3d at 393-94 (citing *United States v. Miller*, 307 U.S. 174, 178 (1939)) (discussing Supreme Court's holding in *Miller* that Second Amendment did not guarantee right to keep short-barreled shotgun because weapon was not part of military equipment and its use did not contribute to common defense), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.). Although the Government in *Miller* argued the Second Amendment's protection was limited to the ownership and use of arms for service in the militia or another military organization, the Supreme Court did not decide *Miller* on this argument. See *id.* at 393 (finding Court's rejection of Government's first argument supports individual right theory); accord *Emerson*, 270 F.3d at 222-24 (noting Court decided *Miller* on basis of Government's argument that "Arms" did not refer to weapons commonly used by criminals).

108. See *Parker*, 478 F.3d at 393 (asserting Supreme Court would have mentioned defendants were not members of state militia or another military organization if Court intended to endorse collective right view in *Miller*), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.); accord *Emerson*, 270 F.3d at 224 (observing that Court's opinion in *Miller* would have mentioned defendants were not members of militia nor engaged in military service if their lack of membership or engagement was decisive). One commentator found it significant that the Supreme Court's decision in *Miller* mentioned neither the "state militia" nor the "National Guard." See GunCite, <http://www.guncite.com/gc2ndsup.html> (last visited Jan. 21, 2008) (arguing *Miller* is often misinterpreted).

109. See, e.g., Op. Off. Legal Counsel, *supra* note 4, at 4 (emphasizing *Miller* does not support collective right view, in part because Supreme Court did not discuss whether individuals were members of military organization).

110. See *Parker*, 478 F.3d at 395 (holding Second Amendment protects individual's right), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.); accord COOLEY, *supra* note 27, at 282 (finding Second Amendment's right was not limited to members of militia).

C. *Does the Second Amendment Even Apply to the District of Columbia?*

In the District's final attempt to save its gun control ordinances, it argued that it was not subject to the Second Amendment because, first, it is a federal entity and, second, its local legislation does not interfere with the security of a free state.<sup>111</sup> The D.C. Circuit observed, however, that the Supreme Court has held the Constitution and the Bill of Rights are controlling in the District.<sup>112</sup> Furthermore, the D.C. Circuit did not need to resolve whether the Second Amendment's guarantee was limited to the militias of the fifty states because the Second Amendment's protection was not limited to state militias.<sup>113</sup> Like its state counterparts, the District's militia was an integral part of maintaining the "security of a free State," regardless of whether the District's militia was literally a "state" militia.<sup>114</sup> The fear that a national standing army threatened individual liberty pervaded the thoughts of many eighteenth century Americans, including the District's residents.<sup>115</sup> Therefore, the D.C. Circuit concluded the Second Amendment's use of "State" is synonymous with country.<sup>116</sup> The *Parker*

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111. *See Parker*, 478 F.3d at 395 (stating District's argument that District is not subject to Second Amendment because it is federal entity), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.).

112. *See id.* (citing *O'Donoghue v. United States*, 289 U.S. 516 (1933)) (declaring District is subject to Second Amendment). While the Second Amendment has not been held to be incorporated through the Fourteenth Amendment, the D.C. Circuit found the District is a federal district controlled by Congress. *See id.* at 391 n.13 (explaining District is directly restrained by Bill of Rights, even in absence of incorporation).

113. *See id.* at 395-96 (dismissing District's argument that Second Amendment does not apply in District).

114. *See id.* at 396 (rejecting District's argument that it is not subject to Second Amendment's restraints).

115. *See id.* at 396-97 (emphasizing that Second Amendment was concerned with preserving individual liberty so standing army would not be necessary); *accord* *United States v. Miller*, 307 U.S. 174, 179 (1939) ("The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia[.]"); ALDERMAN & KENNEDY, *supra* note 12, at 99 ("The tyranny of the British army during colonial times had made Americans intensely suspicious of military power not subject to civilian control."). Most delegates to the Constitutional Convention in 1787 agreed, however, that Congress should have the authority to raise an army to protect the government and the nation. *See* ALDERMAN & KENNEDY, *supra* note 12, at 99 (discussing that, under Constitution, Congress can declare war, raise army and summon militia, but states retain power to appoint militia officers and train members of militia).

116. *See Parker*, 478 F.3d at 396 (citing THE COMPLETE BILL OF RIGHTS 169 (Neil H. Cogan ed., 1997)) (emphasizing James Madison's initial proposal of Second Amendment to First Congress provided that well regulated militia was "the best security of a free country"), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.). Unlike other constitutional provisions that use the language "the states" or "each state" to refer to an entity such as Pennsylvania, the Second Amendment's phrase "a free State" refers to republican government. *See id.* (explaining use of indefinite article "a" and modifier "free" with word "State" is unique to Second Amendment).

dissent, however, agreed with the District and argued the District was not a state within the meaning of the Second Amendment, and thus the Second Amendment's reach did not extend to it.<sup>117</sup>

## V. THE D.C. CIRCUIT HIT THE TARGET BY RECOGNIZING AN INDIVIDUAL'S RIGHT

Examining whether the Second Amendment protects an individual or collective right does not necessarily define the parameters of the Second Amendment's protections.<sup>118</sup> In the eighteenth century, the right of "the people" was not expressly connected to membership in the militia because the militia consisted of the general citizenry, which the Supreme Court then defined as "civilians primarily, soldiers on occasion."<sup>119</sup> Thus, the Framers would not have prohibited the use and ownership of weapons for private purposes because this would have effectively destroyed the ability of the militia's members to be ready to serve when necessary—a vital aspect of the militia's original purpose.<sup>120</sup>

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117. See *id.* at 401-06 (Henderson, J., dissenting) (arguing that, like Tenth Amendment's use of "the people" that refers to individuals of states, and not people of District, Second Amendment's use of "the people" is also limited to people of states and excludes District's citizens). Additionally, Henderson's dissent found it significant that several constitutional provisions explicitly referring to citizens of "states" did not apply to the District's citizens. See *id.* at 406 (citing *Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954)) (noting Supreme Court found District was not state under Fourteenth Amendment). The dissent further argued that, unlike the states, the District did not need to protect itself from the federal government because the District was a federal entity created as the government's seat. See *id.* at 406-07 (asserting Second Amendment's purpose, to calm fear that national standing army posed threat to individual liberty and sovereignty of states, would not be furthered if Second Amendment applied in District because District does not need protection from federal government).

118. See *United States v. Emerson*, 270 F.3d 203, 273 (5th Cir. 2001) (Parker, J., specially concurring) (explaining debate over nature of Second Amendment's right, whether individual or collective, is "misplaced" and "of no legal significance" because right to keep and bear arms is subject to "reasonable regulation" and thus does not always protect possession of arms).

119. See, e.g., *Miller*, 307 U.S. at 178-79 (observing that militia was maintained and trained by states, and was separate from troops that states could not keep without consent of Congress).

120. See *Parker*, 478 F.3d at 394 ("A ban on the use and ownership of weapons for private purposes, if allowed, would undoubtedly have had a deleterious, if not catastrophic, effect on the readiness of the militia for action."), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.); *Emerson*, 270 F.3d at 235 ("If the people were disarmed there could be no militia."); Lund, *Past and Future*, *supra* note 3, at 61 (commenting that collective right theory cannot be correct because disarming general citizenry is contrary to meaning of militia at time of Founding). The eighteenth century militia's existence required and depended upon an individual's ownership of arms. See *Parker*, 478 F.3d at 394 (arguing First Congress did not intend to distinguish between ownership and use of arms for private purposes and for militia purposes because militia's survival depended upon individual bringing personal arms when called to serve), *cert. granted in part sub nom.* *District of Columbia v. Heller*, 128 S. Ct. 645 (2007) (mem.); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) ("Whether the 'right to

Due to the federalization of the militia, the Second Amendment's goal of preserving a well regulated militia may not seem as relevant today as it was in the eighteenth century when determining whether a firearm regulation violates the Second Amendment.<sup>121</sup> Nevertheless, the reason for the Anti-Federalists' fervent fear of the dissolution of an armed citizenry, knowing that "an opening gambit for tyrants is to disarm the public," is still pertinent today.<sup>122</sup> In 2008, just as the Framers feared in 1787, disarming the militia would undermine the ability of the people to protect themselves and their families from criminals, defend the state and resist an oppressive government.<sup>123</sup>

In light of the militia's duty to protect the state, the *Emerson* decision illuminates why the D.C. Circuit's holding in *Parker* was correct.<sup>124</sup> Unlike the gun possessor in *Emerson*, who was subject to a domestic violence restraining order and had threatened to kill several people, the District's residents wanted to possess "functional firearms" for self-defense.<sup>125</sup> Furthermore, whereas the individual's possession of a gun in *Emerson* would have denied the individual's family and others the freedom from threats of harm, the residents' possession of arms in *Parker* would further the Sec-

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bear arms' for militia purposes is 'individual' or 'collective' in nature is irrelevant where . . . the individual's possession of arms is not related to the preservation or efficiency of a militia."); Hardy, *supra* note 13, at 1243 (emphasizing both individual and collective right views are correct partly because Second Amendment was not intended to have single purpose); Dougherty, *supra* note 29, at 977-78 (explaining members of militia were required to keep arms).

121. See Spitzer, *supra* note 8, at 15 ("[T]he concerns that gave rise to the Second Amendment evaporated as reality changed—that is, as the country turned away from unorganized or general citizen militias, the Second Amendment was rendered obsolete."); see also Cottrol & Diamond, *supra* note 12, at 1003 (observing that, under sophisticated collective right theory, individual's right to keep and bear arms no longer exists because militia has disappeared).

122. See *Nordyke v. King*, 319 F.3d 1185, 1196 (9th Cir. 2003) (Gould, J., specially concurring) (arguing that, in light of Second Amendment's purpose to guard against tyranny, individual's right to keep and bear arms should be recognized).

123. See WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 125-26 (Da Capo Press 1970) (1825) (asserting no clause in Constitution, particularly Second Amendment, gave Congress power to disarm people). Rawle noted that the Second Amendment restrains the state government and the federal government from disarming the people. See *id.* (noting government's attempt to disarm people "could only be made under some general pretence," but would be barred by Second Amendment).

124. See generally Lund, *Past and Future*, *supra* note 3, at 61 (explaining militia did not serve only as military force in modern sense); Op. Off. Legal Counsel, *supra* note 4, at 33 (noting Second Amendment protects security of freedom in state, ensuring that individual liberties and rights are secure).

125. See *Parker*, 478 F.3d at 374 (explaining residents did not assert right to carry firearms outside their homes; rather, residents wanted "functional firearms" that were accessible for self-defense in home), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.); *Emerson*, 270 F.3d at 273 (Parker, J., specially concurring) (noting gun owner in *Emerson* pointed Beretta at spouse and daughter, cocked hammer at spouse and threatened one employee and others).

ond Amendment's purpose by enabling the residents to protect both themselves and the District against threats of harm in a particularly dangerous city.<sup>126</sup> Though the District defended its gun control ordinances as reasonable solutions to its high rates of violent crime, the ordinances did not effectively reduce crime rates; instead, the ordinances destroyed the ability of the District's residents to lawfully protect the District and its citizens.<sup>127</sup>

Unlike past decisions addressing Second Amendment claims, including *Miller*, the D.C. Circuit comprehensively discussed the Second Amendment's history and the right to keep and bear arms as it was understood and exercised in early America.<sup>128</sup> The D.C. Circuit's opinion in *Parker* is consistent with the Supreme Court's rationale in *Miller*, even though the cases addressed significantly different facts.<sup>129</sup> In contrast to the handguns at issue in *Parker*, weapons commonly used by private citizens for self-defense, the shotguns at issue in *Miller* were used primarily by criminals.<sup>130</sup> Thus, *Miller*'s holding should be read narrowly to approve the regulation of only those weapons that are rarely used by law-abiding citizens and are more frequently used by criminals.<sup>131</sup> As such, the D.C. Circuit correctly

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126. See *Emerson*, 270 F.3d at 273 (Parker, J., specially concurring) (declaring individual's Second Amendment right in *Emerson* did not supersede rights of individual's wife, daughter and others "to be free from bodily harm or threats of harm"); see also Op. Off. Legal Counsel, *supra* note 4, at 35 (concluding District's residents furthered Second Amendment's aim, security of free state, by privately keeping arms to help secure freedom of state and its citizens and by being ready to serve in militia when necessary).

127. See *Quilici v. Morton Grove*, 695 F.2d 261, 280 (7th Cir. 1982) (Coffey, J., dissenting) ("A fundamental part of our concept of ordered liberty is the right to protect one's home and family against dangerous intrusions . . ."); Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 STAN. L. & POL'Y REV. 25, 30 (1997) (finding Framers enacted Second Amendment primarily to protect individual's right of self-defense); David E. Murley, *Private Enforcement of the Social Contract: Deshaney and the Second Amendment Right to Own Firearms*, 36 DUQ. L. REV. 15, 17 (1997) (finding Second Amendment guarantees individual's right to engage in self-defense); Robert Barnes, *Foes of D.C. Handgun Ban Seek Supreme Court Review*, WASH. POST, Oct. 5, 2007, at B01 (recounting residents' argument that only way District's residents could defend themselves with rifle for self-defense, after District enacted its gun control ordinances, was by "throwing" rifle at attacker or by "wielding" rifle as club).

128. See Nelson Lund, *The Ends of Second Amendment Jurisprudence: Firearms Disabilities and Domestic Violence Restraining Orders*, 4 TEX. REV. L. & POL. 157, 164 (1999) [hereinafter Lund, *The Ends of Second Amendment Jurisprudence*] (asserting opinions of other federal courts addressing Second Amendment claims lacked "intellectual rigor" and were "unnecessarily sweeping").

129. See *id.* at 166 (characterizing *Miller* as "highly ambiguous").

130. See *id.* at 170 (noting weapons at issue in *Miller* were suited to criminal uses and were rarely needed for "legitimate civilian purposes"); Lund, *Past and Future*, *supra* note 3, at 72 (explaining "handguns have important functional advantages in self-defense").

131. See Lund, *The Ends of Second Amendment Jurisprudence*, *supra* note 128, at 171 (explaining *Miller* should be read as upholding restrictions "only on weapons that have the special characteristics shared by those identified in the National Fire-

determined the District's gun control laws violated the residents' Second Amendment rights by restricting the possession of weapons that are commonly used by private individuals for self-defense.<sup>132</sup>

## VI. CONCLUSION

The D.C. Circuit's decision in *Parker* creates both positive and negative precedent for future Second Amendment claims in the D.C. Circuit and any courts that choose to follow the opinion.<sup>133</sup> The belief that more guns equals more crime lurks in the background of the debate over the right to keep and bear arms, and expansively interpreting *Parker* could lead to an increase in violent crime rates and provide criminal defendants with another opportunity to overturn their convictions.<sup>134</sup>

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arms Act of 1934—i.e., slight value to law-abiding citizens and high value to criminals”).

132. See Lund, *Past and Future*, *supra* note 3, at 72 (asserting District's ordinances restricting handgun possession infringed individual's right to keep and bear arms because ordinances forced individual to use rifles and shotguns for self-defense, and rifles and shotguns are more lethal than handguns); see also 94 C.J.S. *Weapons* § 4 (2007) (observing that “arms,” when found in constitutional provisions that guarantee right to bear arms for defense of self and state, should not be limited by historical and military test, but instead should “include arms customarily kept by law-abiding citizens for their protection”).

133. Compare Op. Off. Legal Counsel, *supra* note 4, at 7-9 (finding that existing case law does not settle scope of Second Amendment's protection and examination of Second Amendment's original meaning and text demonstrates Second Amendment guarantees individual's right to keep and bear arms), with *Silveira v. Lockyer*, 312 F.3d 1052, 1065 (9th Cir. 2002) (observing Fifth Circuit's decision in *Emerson* and Justice Department's current position that Second Amendment protects individual's right has resulted in many challenges to federal statutes that regulate sale and possession of weapons), Robert Barnes and David Nakamura, *D.C. Case Could Shape Gun Laws; Supreme Court is Asked to Uphold Ban*, WASH. POST, Sept. 5, 2007, at A01 (mentioning view that more handguns in home leads to more violence), and Brady Center to Prevent Gun Violence, *supra* note 68, at 1 (arguing D.C. Circuit “made errors of history, errors of law, and errors of logic”).

134. See Brandeis Brief Supporting Appellants (Criminology of Firearms) at 1, *Parker v. District of Columbia*, 311 F. Supp. 2d 103 (D.D.C. 2004) (No. 04-7041) (“Underlying the enactments challenged in this case is the quasi-religious faith that the more guns . . . there are, the more violence and death there will be . . .”); Lieber, *supra* note 7, at 1084-85 (arguing that interpreting Second Amendment as individual's right gives criminal defendants opportunities to overturn their convictions); Brady Center to Prevent Gun Violence, *Second Amendment Fantasy: The D.C. Circuit's Opinion in the Parker Case*, <http://www.gunlawsuits.org/defend/second/fantasy/pdf/parker-opinion-intro.pdf> (last visited Jan. 21, 2008) (fearing *Parker* will be used as “all-purpose excuse for inaction on gun violence”). See generally Barnett, *supra* note 65, at 157 (arguing Second Amendment guarantees individual's right to possess arms for personal protection); Gallia, *supra* note 4, at 151 (noting that most convincing argument for prohibiting individuals from keeping and bearing arms is violence in modern society); Bureau of Justice Statistics, United States Department of Justice, <http://www.ojp.usdoj.gov/bjs/guns.htm> (last visited Jan. 21, 2008) (noting firearm-related crime rates have declined since 1993, but slightly increased in 2005). For every time a gun is used legally in a home, there are twenty-two criminal, accidental or suicide-related shootings. See Brady Campaign to Prevent Gun Violence, Firearm Facts, <http://www.bradycampaign.org/issues/>

Ultimately, though, the D.C. Circuit's decision was a step in the right direction for Second Amendment jurisprudence because it illustrated that courts should scrutinize firearm regulations, instead of examining an individual who brings a Second Amendment claim, as courts do with every other individual liberty protected in the Bill of Rights.<sup>135</sup> The D.C. Circuit correctly interpreted the Second Amendment's history and properly considered the Second Amendment in light of its purposes of protecting the country from domestic tyranny and promoting the security of a free state.<sup>136</sup> While broadly interpreting *Parker* could backfire, the Supreme

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gvstats/firearmoverview/ (last visited Feb. 2, 2008) (asserting that having gun in one's home poses great risk to family and friends). According to some commentators, however, high rates of gun ownership result in a decline in the rates of violent crimes. See Brandeis Brief Supporting Appellants, *supra* at 5-11 (observing studies do not conclude more guns leads to more violence, and studies demonstrate, if anything, opposite correlation); JOHN R. LOTT, JR., AMERICAN ENTERPRISE INSTITUTE, RIGHT-TO-CARRY LAWS AND VIOLENT CRIME REVISITED: CLUSTERING, MEASUREMENT ERROR, AND STATE-BY-STATE BREAK DOWNS 11 (2004) (finding right-to-carry laws lead to decline in murder, rape and robbery rates, supporting notion that more guns equals less violent crime); Lund, *Past and Future*, *supra* note 3, at 63 (finding violent crime is not reduced by disarming individuals); Florenz Plassmann & John Whitley, Comment, *Confirming "More Guns, Less Crime,"* 55 STAN. L. REV. 1313, 1359 (2003) (explaining states with greatest increases in gun ownership have experienced greatest declines in burglaries); Political Report from Chris Cox, NRA-ILA Executive Director (Sept. 4, 2007), <http://www.nra.org/Hunting/Read/HuntingArticles.aspx?ID=250> ("[B]anning guns does not reduce crime. If anything, crime increases in jurisdictions that ban guns."). According to one statistic, guns are used three to six times more often to resist criminals than by criminals in attempting crimes. See Brandeis Brief Supporting Appellants, *supra*, at 1-2 (arguing modern firearms are most effective means of self-defense). Interestingly, countries that have strict gun control laws experience a decline in gun-related crime initially, but then crime rates return to the levels experienced before the gun control ordinances were enacted. See Gallia, *supra* note 4, at 155 (observing that Switzerland has one of highest rates of gun ownership in world and has practically zero gun crime). In recent decades in the United States, the per capita accumulated stock of firearms has increased, though there has been no consistent increase in gun violence. See Brandeis Brief Supporting Appellants, *supra*, at 5 (refuting argument that more guns equals more death). In the District of Columbia specifically, five years before the District banned the possession of certain handguns, the murder rate declined from thirty-seven per 100,000 population to twenty-seven per 100,000 population. See *id.* at 19 (arguing District's handgun prohibition did not reduce violence). Five years after the enactment of the ordinances, however, the murder rate increased to thirty-five per 100,000 population and reached levels lower than the pre-ordinance levels only once. See *id.* (same).

135. See *Nordyke v. King*, 319 F.3d 1185, 1197 (9th Cir. 2003) (Gould, J., specially concurring) (commenting that Supreme Court's recognition of individual's right to keep and bear arms would place Second Amendment jurisprudence on "the right track"); see also Lund, *The Ends of Second Amendment Jurisprudence*, *supra* note 128, at 165 (arguing courts that have adopted collective right view "have so casually read the Second Amendment to mean essentially nothing"). See generally Lieber, *supra* note 7, at 1085 (noting that if individual right view is widely adopted, government should bear burden of showing compelling governmental interest in firearm regulations).

136. See *Parker v. District of Columbia*, 478 F.3d 370, 395 (D.C. Cir. 2007) (finding Second Amendment's right "was premised on the private use of arms for



Court should follow *Parker's* interpretation of *Miller* and unambiguously establish that the Second Amendment protects an individual's right to keep and bear arms, subject to reasonable restrictions.<sup>137</sup>

Unless the Court guides the lower courts in interpreting Second Amendment claims, courts will continue to struggle to determine when, if ever, an individual's Second Amendment right is violated.<sup>138</sup> Until then, let us hope the words of John F. Kennedy ring true:

Although it is extremely unlikely that the fears of governmental tyranny which gave rise to the Second Amendment will ever be a major danger to our nation, the Amendment still remains an important declaration of our basic civilian-military relationships . . . . For that reason I believe the Second Amendment will always be important.<sup>139</sup>

Allison L. Mollenhauer

activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government"), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.).

137. See, e.g., Lund, *The Ends of Second Amendment Jurisprudence*, *supra* note 128, at 164 (arguing, before *Emerson* was decided, that Fifth Circuit should refuse to follow other federal courts and should instead correctly interpret Second Amendment as guaranteeing individual's right to keep and bear arms). The government is not entirely prohibited from regulating the use and ownership of pistols. See *Parker*, 478 F.3d at 399 (noting Second Amendment is subject to same "reasonable restrictions" that limit First Amendment), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.). In certain circumstances, the Second Amendment is not violated when individuals are deprived of their right to keep and bear arms. See, e.g., *United States v. Tot*, 131 F.2d 261, 266-67 (3d Cir. 1942) (finding statute proscribing receipt of weapons from interstate commerce by anyone convicted of violent crime did not violate Second Amendment), *rev'd on other grounds*, 319 U.S. 463 (1943). For instance, a regulation that promotes the government's interest in public safety is a reasonable restriction of the Second Amendment's right because it does not impair conduct the right was intended to protect. See *Parker*, 478 F.3d at 399 (listing reasonable regulations of weapons), *cert. granted in part sub nom.* District of Columbia v. Heller, 128 S. Ct. 645 (2007) (mem.). Additionally, reasonable restrictions are consistent with preserving a well regulated militia because individual characteristics that render gun ownership dangerous to society, such as insanity or felonious conduct, also render an individual unsuitable for serving in the militia. See, e.g., *id.* (noting registration of firearms is consistent with well regulated militia because registration provides government with information about how many people would be armed if called for militia service); *United States v. Pfeifer*, 371 F.3d 430, 437-38 (8th Cir. 2004) (holding statute prohibiting possession of firearm after defendant's conviction of misdemeanor crime of domestic violence did not violate Second Amendment); see also Memorandum from the Office of the Attorney General to all United States Attorneys, *supra* note 14 (asserting reasonable restrictions on Second Amendment's right can be imposed to prevent "unfit persons" from owning arms and to limit ownership of arms "particularly suited to criminal misuse").

138. See Gallia, *supra* note 4, at 161 (emphasizing that Supreme Court should decide exactly what right Second Amendment guarantees).

139. John F. Kennedy, *Know Your Lawmakers*, GUNS, Apr. 1960, at 4.